

100TH CONGRESS
1st Session

HOUSE OF REPRESENTATIVES

REPORT
100-208

EMPLOYEE POLYGRAPH PROTECTION ACT

JULY 9, 1987.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HAWKINS, from the Committee on Education and Labor,
submitted the following

REPORT

together with

MINORITY, DISSENTING, ADDITIONAL, SUPPLEMENTAL
DISSENTING, AND ADDITIONAL DISSENTING VIEWS

[To accompany H.R. 1212]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and Labor, to whom was referred the bill (H.R. 1212) to prevent the denial of employment opportunities by prohibiting the use of lie detectors by employers involved in or affecting interstate commerce, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Employee Polygraph Protection Act".

SEC. 2. PROHIBITIONS ON LIE DETECTOR USE.

It shall be unlawful for any employer engaged in commerce or in the production of goods for commerce—

(1) directly or indirectly, to require, request, suggest, or cause any employee or prospective employee to take or submit to any lie detector test;

(2) to use, accept, refer to, or inquire concerning the results of any lie detector test of any employee or prospective employee;

(3) to discharge, dismiss, discipline in any manner, or deny employment or promotion to, or threaten to take any such action against—

(A) any employee or prospective employee who refuses, declines, or fails to take or submit to any lie detector test; or

97-006

(B) any employee or prospective employee on the basis of the results of any lie detector test; or
 (4) to discharge or in any manner discriminate against an employee or prospective employee because—

(A) such employee or prospective employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act;

(B) such employee or prospective employee has testified or is about to testify in any such proceeding; or

(C) of the exercise by such employee, on behalf of himself or others, of any right afforded by this Act.

SEC. 3. NOTICE OF PROTECTION.

The Secretary of Labor shall prepare, have printed, and distribute a notice that employers are prohibited by this Act from using a lie detector test on any employee or prospective employee. Each employer shall post and keep posted, in conspicuous places upon its premises where notices to employees and prospective employees are customarily posted, the notice distributed by the Secretary under this section.

SEC. 4. AUTHORITY OF THE SECRETARY OF LABOR.

(a) IN GENERAL.—The Secretary of Labor shall—

(1) promulgate rules and regulations as may be necessary or appropriate for carrying out this Act;

(2) cooperate with regional, State, local, and other agencies, and cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this Act; and

(3) make investigations and inspections and require the keeping of records necessary or appropriate for the administration of this Act.

(b) SUPREMACY AUTHORITY.—For the purpose of any hearing or investigation under this Act, the Secretary shall have the authority contained in sections 9 and 10 of the Federal Trade Commission Act (15 U.S.C. 49, 50).

SEC. 5. ENFORCEMENT PROVISIONS.

(a) CIVIL PENALTIES.—(1) Subject to paragraph (2)—

(A) any employer who violates section 3 may be assessed a civil money penalty not to exceed \$100 for each day of the violation; and

(B) any employer who violates any other provision of this Act may be assessed a civil penalty not to exceed \$10,000.

(2) In determining the amount of any penalty under paragraph (1), the Secretary shall take into account the previous record of the person in terms of compliance with this Act and the gravity of the violation.

(3) Any civil penalty assessed under this subsection shall be collected in the same manner as is required by subsections (b) through (e) of section 503 of Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1853) with respect to civil penalties assessed under subsection (a) of such section.

(b) INJUNCTIVE ACTIONS BY THE SECRETARY.—The Secretary may bring an action to restrain violations of this Act. The district courts of the United States shall have jurisdiction, for cause shown, to issue temporary or permanent restraining orders and injunctions to require compliance with this Act.

(c) PRIVATE CIVIL ACTIONS.—(1) An employer who violates the provisions of this Act shall be liable to the employer or prospective employee affected by such violation. An employer who violates the provisions of this Act shall be liable for such legal or equitable relief as may be appropriate, including (without limitation) employment, reinstatement, promotion, the payment of wages lost, and additional amount as consequential damages.

(2) An action to recover the liability prescribed in paragraph (1) may be maintained against the employer in any Federal or State court of competent jurisdiction by any one or more employees or prospective employees (or any person acting on behalf of such employee or employees for or in behalf of himself or themselves and other employees or prospective employees similarly situated. No such civil action may be commenced more than 3 years after the date of the alleged violation.

(3) The court shall award to a prevailing plaintiff in any action under this subsection the reasonable costs of such action, including attorneys' fees.

SEC. 6. EXEMPTIONS.

(a) NO APPLICATION TO GOVERNMENTAL EMPLOYERS.—The provisions of this Act shall not apply with respect to the United States Government, a State or local government, or any political subdivision of a State or local government.

(b) **NATIONAL DEFENSE AND SECURITY EXEMPTION**—(1) Nothing in this Act shall be construed to prohibit the administration, in the performance of any counterintelligence function, of any lie detector test to—

(A) any expert or consultant under contract to the Department of Defense or any employee of any contractor of such department; or

(B) any expert or consultant under contract with the Department of Energy in connection with the atomic energy defense activities of such department or any employee of any contractor of such department in connection with such activities.

(2) Nothing in this Act shall be construed to prohibit the administration, in the performance of any intelligence or counterintelligence function, of any lie detector test to—

(A)(i) any individual employed by, or assigned or detailed to, the National Security Agency or the Central Intelligence Agency, (ii) any expert or consultant under contract to the National Security Agency or the Central Intelligence Agency, (iii) any employee of a contractor of the National Security Agency or the Central Intelligence Agency, or (iv) any individual applying for a position in the National Security Agency or the Central Intelligence Agency; or

(B) any individual assigned to a space where sensitive cryptologic information is produced, processed, or stored for the National Security Agency or the Central Intelligence Agency.

(c) **EXEMPTION FOR FBI CONTRACTORS**.—Nothing in this Act shall be construed to prohibit the administration, in the performance of any counterintelligence function, of any lie detector test to an employee of a contractor of the Federal Bureau of Investigation of the Department of Justice who is engaged in the performance of any work under the contract with such Bureau.

SEC. 7. DEFINITIONS.

As used in this Act—

(1) the term "lie detector test" includes any examination involving the use of any polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other device (whether mechanical or electrical) which is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty of an individual;

(2) the term "employer" includes an agent, independent contractor, employee, or any other person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee; and

(3) the term "commerce" has the meaning provided by section 3(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(b)).

SEC. 8. EFFECTIVE DATE.

This Act shall take effect 6 months after the date of its enactment.

INTRODUCTION AND BRIEF SUMMARY OF LEGISLATION

The Office of Technology Assessment (OTA) estimates that more than 2 million polygraph tests are given each year. The number of tests given has tripled in the last 10 years. The shocking fact is that the bulk of these tests aren't being given by the FBI, CIA, NSA, or state and local police departments—90 percent of these 2 million tests are given by private business. Approximately three-quarters of these tests are given for preemployment testing. The remaining one-quarter are used for examinations of employed workers.

The polygraph, or lie detector, consists of a pneumograph tube, a cardio-cuff and electrodes which records a subject's blood pressure, pulse, respiration and galvanic skin resistance while a series of questions are posed. Polygraph equipment hasn't changed over the years. The polygraph and other lie detectors assume that there is a direct correlation between deception and physiological responses. A lie detector does not register deception; it registers stress through physiological responses—whether out of anxiety, fear, anger or nervousness.

Through the years, states have made sporadic efforts to control the use of these devices. Twenty-two States and the District of Columbia have passed legislation prohibiting their use in the private workforce, while 19 States have attempted to regulate their use. However, these separate laws have not proven effective. Often employers undermine State law by pressuring employees and job seekers into "volunteering" to take a test although the state law prohibits requiring or requesting an examination. In States that completely ban the use of lie detectors, employers may avoid the law by hiring in a neighboring state which permits examination and then transferring the employee into the state where such testing is prohibited. State regulation, while ineffective, has proven to be a "seal of approval" of the gadget, resulting in the explosive rise to more than 2 million tests given per year.

H.R. 1212, the Employee Polygraph Protection Act, was introduced in the 100th Congress to address this problem at the national level.

H.R. 1212 would uniformly ban the use of these tests by most private employers. This legislation would protect workers who are wrongfully denied employment and whose careers are devastated because of lie detector test inaccuracies and employer abuses.

Some employers who currently use lie detectors extensively testified on their preference for mandatory regulation of the examiners rather than the elimination of the tests. They believe that lie detector tests are their most cost effective and convenient tools for employee screening to prevent employee theft. However, this ignores the fact that lie detectors have been proven to be unreliable in detecting truth as well as glossing over the fact that the use of lie detectors violates workers' rights. Examiners often question employees concerning their sexual practices, home situations, finances, union activity, political and religious beliefs as well as other personal subjects.

The American Psychological Association, before the Subcommittee on Employment Opportunities, gave an example of the inaccuracy of these tests:

Assume that polygraph tests are 85 percent accurate, a fair assumption based on the 1988 OTA report. Consider, under such circumstances, what would happen in the case of screening 1,000 employees, 100 of whom (10 percent) were dishonest. In that situation, one would identify 85 of the dishonest employees, but at the cost of misidentifying 135 (15 percent) of the honest employees. As you can see, in this situation, the polygraph tester identifies 220 "suspects", of whom 61 percent are completely innocent. It can be shown mathematically that if the validity of the test drops below 85 percent, then the misidentification rate increases. Similarly, if the base rate of dishonesty is less than 10 percent, and it most likely is, the misidentification rate increases. It is obvious that in the employment screening situation it is a mathematical given that the majority of identified "suspects" are in fact innocent!

The sad consequence of basing employment decisions on inaccurate "lie detector" tests is that employers are refusing to hire able

employees, putting honest citizens in the unemployment line, and hiring deceitful people and those who know how to beat the tests. The Hotel Employees and Restaurant Employees International Union estimates that at least 200,000 Americans are denied jobs every year because employers rely on inaccurate "lie detector" tests to make personnel decisions.

For the past three years, in subcommittee hearings and prior to that, subcommittee majority and minority members have asked companies and organizations to establish the difference in employee theft between States that allow tests and States that do not. As of this date, no group has produced data proving that there is any drop in theft in States where the polygraph is used versus States where it is prohibited.

The Employee Polygraph Protection Act, if enacted, would protect workers from discrimination in employment by eliminating the general use of lie detectors in the workplace.

The bill protects workers who are wrongfully denied employment and whose careers are devastated based on the results of these questionable tests. Tens of thousands of workers are wrongfully denied employment every year, either because they refuse to take the tests or because of the inherent inaccuracies of the machines and their operators.

The bill would in no way prevent or limit the U.S. Justice Department's use of a polygraph test during a criminal investigation. The department would continue to be allowed to either request an individual to take a polygraph test as part of that investigation, or agree to administer a polygraph test at the request of an individual under investigation.

Our Constitution presumes that an individual is innocent until proven guilty. The polygraph abuses that principle because it requires one to prove one's innocence. The courts in this country refuse to admit polygraph results as evidence in trials because of the documented inaccuracies of these devices. It is sadly ironic that criminals are protected from polygraphs while American workers are not. This bill will put an end to this duplicity.

LEGISLATIVE HISTORY AND COMMITTEE ACTION

Representative Pat Williams (D-MT) introduced the Employee Polygraph Protection Act, H.R. 1212, on February 24, 1987. H.R. 1212 prohibits the use of polygraphs and other lie detectors by private sector employers involved in interstate commerce.

The bill, which has 181 cosponsors and bipartisan support, was referred to the Commission on Education and Labor. H.R. 1212 was referred to the Subcommittees on Employment Opportunities, Labor Standards and Labor-Management Relations on March 4, 1987.

The Subcommittee on Employment Opportunities held hearings on this legislation March 5 and April 30, 1987. Testimony was received from the late Representative Stewart McKinney and Representative George "Buddy" Darden as well as a representative for the Justice Department and private sector employers and employees. Since the 93rd Congress a total of 8 days of hearings have been conducted on polygraph legislation.

Last year, the House considered H.R. 1524, which was also introduced by Representative Williams. The legislation, as amended, passed the House by a vote of 236-173. The Senate also conducted hearings on similar legislation and the Senate version was reported out of the Committee on Labor and Human Resources. However, no further action was taken by the Senate prior to the adjournment of the 99th Congress.

An open mark-up session was held by the Subcommittee on Employment Opportunities on April 30, 1987. At that time, Representative Pat Williams offered a package of five amendments. The five amendments included an exemption for private sector employers doing intelligence or counterintelligence work with the defense agencies; a technical amendment clarifying the term "employer"; an amendment placing a 3-year statute of limitation for private civil action; a technical amendment clarifying the posting of public notices and allowing for a maximum fine of \$100 a day for failure to post the appropriate notice and a technical amendment clarifying the language of the bill. This package of amendments passed the subcommittee by unanimous voice vote. Representative Williams also offered an amendment to expand the definition of lie detector tests to include "oral and written" tests. This amendment passed by a roll call vote of 7-4. The bill, as amended, was favorably reported to the full committee by a vote of 9-2.

The Committee on Education and Labor met on June 10, 1987 to consider H.R. 1212. The Committee approved by voice vote a motion discharging the Subcommittees on Labor-Management Relations and Labor Standards from further consideration of H.R. 1212. The Committee amended the bill to delete the words "oral and written tests" from the definition of lie detector tests. The Committee also deleted the words "methods" and "chemical" as well as "detecting deception, verifying truthfulness" from the definition. The Committee ordered the bill, as amended, favorably reported to the House of Representatives by a vote of 25-9.

NEED FOR LEGISLATION

H.R. 1212 has been introduced in this Congress to help protect workers' rights, while also protecting employers from a growing number of lawsuits regarding lie detector examinations, many of which are being won by workers and applicants.

Lie detector devices can include the Voice Stress Analyzer (VSA), the Psychological Stress Evaluator (PSA) and other mechanical and electrical tests as well as the polygraph.

For more than 20 years Congress has been interested in the validity of these tests and every study done since 1963 for the United States Congress has found that there is no scientific basis for polygraphs as lie detectors. These studies have concluded that the test's inaccuracy and the violation of workers' rights outweigh any positive results of lie detectors.

In testimony before the subcommittee, the Legal Action Center reported that these tests, although unfair to all workers, singled out particular groups for discrimination. There is rapidly mounting evidence that employment screening polygraph tests have a substantial discriminatory effect on Black job applicants and employ-

ees. Certain practices of commercial polygraph examiners also have a tendency to unfairly discriminate against persons with physical or mental disabilities. They testified further that—

the shortcomings of employment polygraph testing as a means of detecting deception can explain the tendency of these tests to disadvantage minorities. First of all, the polygraph is a measure of physiological functions, and there is research evidence of ethnic and group differences in physiological reactivity to stress which may affect the polygraph's validity when used on particular groups. Secondly, the inherent subjectivity of determinations based on the polygraph creates extensive opportunities for conscious or unconscious biases and cultural stereotypes to affect the decisions made by polygraph examiners.

In 1965 the Foreign Operations and Government Information Subcommittee of the House Committee on Government Operations stated in a lie detector study,

There is no lie detector; neither machine nor human. People have been deceived by a myth that a metal box in the hands of an investigator can detect truth or falsehood.

The Privacy Protection Study Commission, established by Congress 1974, also reported the inaccuracy of lie detector tests and recommended a federal law banning not only the use of these tests in employment but also the banning of the manufacturing and selling of the devices.

The test validity is primarily affected by the examiner, the subject and the setting. Examiners render a speculative interpretation on the meaning of a complex graphic pattern reflecting oral, behavioral and physiological responses. However, many of these examiners are high school graduates with less than six weeks of training while others do have advanced degrees but no training in psychology or labor laws. When a examiner administers and scores a test, no one can determine what portion of the score is attributed to the test display, the subject's behavior, or the examiner's bias. In fact, examiners have admitted that a subject's behavioral cues often enhance the likelihood of recognition of a deception.

The fact remains that no one, regardless of experience, can determine from a polygraph chart why a subject responded in a certain way, whether out of guilt, fear, anger or an artificial reaction resulting from self-inflicted pain. Testimony received by the subcommittee shows that polygraph test results can be controlled by the examinee and that the test can be beaten. By being able to recognize relevant questions and by physiologically responding "correctly" to them, the test can be beaten. The test results reflect physiological stress only, regardless of cause.

Employers believe that the polygraph is their major source of protection against the estimated \$40 billion lost in the private sector each year due to theft. The National Institute of Justice estimates that securities fraud, corporate kickbacks, embezzlement and insurance fraud cost employers three times the amount of loss than employee theft. However, corporate management which is usually responsible for these types of thefts is not subjected to lie de-

tector tests, while the hourly employees are most likely to be subjected to testing. In fact, the vast majority of the corporate management has never taken a lie detector test.

Opponents of polygraphs suggest that the money used to administer these tests could be spent more efficiently for background checks of an applicant's work history and sound inventory control systems. Others suggest that the erosion of employee morale and the risk of employers' liability may not be worth the use of these tests. In addition, the results of internal auditing procedures can be used as evidence in court against an employee while the polygraph results may not.

The National Institute of Justice Study on Employee Theft shows that employers who display respect for their employees' rights and do not administer lie detector tests have a lower theft rate than those who do administer the tests. Although employees are frequently the most apparent victims of lie detector tests, employers may also be compromising their security by relying on machines that do not work.

The growing use of these subjective tests by employers to ferret out "dishonest" employees and "undesirable" applicants has caused many people not only to focus on the accuracy of these tests, but also the lawfulness of this practice. The legal concerns over the lie detector tests include the violation of employees' rights—to privacy, to the due process of law and to the equal protection of the laws of the United States. Federal action is needed to protect workers' rights, while also protecting employers from the growing number of lawsuits regarding lie detector examinations.

After more than sixty years, a 1923 case, *Frye vs. United States*, is still often quoted by the courts. The decision states:

The systolic blood pressure deception test has not yet gained such standing and scientific recognition among courts in admitting expert testimony deduced from the discovery, developments, and experiments thus far.

In spite of this, employers are increasing their use of the polygraph to screen prospective employees and monitor current ones. These employers, believing in the reliability of lie detectors, have begun to use the polygraph test as an easy and inexpensive way to find dishonest and potentially dishonest people. More than thirty percent of the Fortune 500 companies and at least half of the retail trade firms reportedly rely on the tests as a replacement for or enhancement of reference checks. These tests, used by employers in pre-employment and random on-the-job screening, are not used just to detect deception, but are often used to gain personal information about applicants' thoughts and attitudes.

Organizations have claimed that States should be allowed to handle the issue of lie detectors. However, State statutes of lie detectors vary greatly. Only nine states currently have no laws governing any aspect of employee polygraph testing. Nineteen states either require licensing of polygraph examiners or regulate the conduct of polygraph examinations. Ten states prohibit most private employers from requiring a polygraph examination as a condition of employment or continued employment, but allow an employer to request such an exam. Finally, twelve states and the Dis-

strict of Columbia prohibit private employers from requiring or requesting that a polygraph test be taken as a condition of employment, effectively banning its use in employment. Testimony before the subcommittee has also shown that state polygraph regulatory agencies are not effective and few have ever taken disciplinary action against any examiners. Testimony also revealed that few employees know of the state regulatory agencies and their right to file a grievance.

Many have also argued that the polygraph tests should be regulated instead of banned. However, as testimony before the Subcommittee on Employment Opportunities points out,

Simply "regulating" polygraph testing begs the key issue of polygraph validity. No amount of training or experience on the part of an examiner can overcome the glaring absence of scientific evidence supporting the underlying premise of lie detector testing, particularly in the area of preemployment or random screening. No amount of procedural "safeguards" or detailed statutory instructions on how employment polygraph tests may be conducted can alleviate the fundamental unfairness of claiming to measure an individual's integrity by means of this dubious process.

Lie detector tests have a built-in bias against truthful people. The more honest workers are, the more likely they will fail the test because of their heightened sensitivity to having their honesty challenged, or from fear of suspicion of being misdirected at them. Dr. Leonard Saxe, principal author of the U.S. Congress, Office of Technology Assessment (OTA) report, "The Scientific Validity of Polygraph Tests", agrees that "because exceptionally honest and intelligent individuals may be highly reactive to questions about their truthfulness, such desirable employees will be misidentified at highest rates than other less desirable employees." Those workers who fail the test carry this stigma with them on their personnel records which could ruin their future careers. Subcommittee testimony demonstrated that being fired from a job after failing a polygraph examination, even after being proven innocent, has affected employees' job opportunities.

In analyzing whether the use of lie detectors in the workplace should continue, Congress must weight the interests of both parties, employers and employees alike. Where a less drastic and abusive method to deter and detect theft exists, such a strong personnel and inventory control methods, Congress must urge that those alternatives be used. We must carefully scrutinize the validity as well as the abuses of lie detector examinations. It is the judgment of this Committee that H.R. 1212 is necessary to address the concerns outlined above.

MAJOR PROVISIONS OF H.R. 1212

The Committee on Education and Labor is concerned about employees who are wrongfully denied employment opportunities based on lie detector tests. The Committee, by reporting H.R. 1212, the Employee Polygraph Protection Act, intends to protect employees by prohibiting the use of lie detectors in the private workforce: pro-

testing the thousands of innocent workers who are wrongfully denied employment each year because of these inaccurate devices.

Prohibitions

The Committee recognizes that specific details relating to the employer prohibitions concerning the administration of lie detector tests are needed to protect employees' rights. The Committee, by agreeing to language prohibiting employers from indirectly suggesting a lie detector test, acknowledges a major concern that employers not be allowed to coerce employees into volunteering for a test. As polygraphers and employees acknowledge, refusal to volunteer for a test in a State that only prohibits an employer from requiring an examination can many times result in the loss of a job. The bill prohibits not only indirect suggestion of a lie detector test, but also prohibits employers from requiring or requesting lie detector tests or from referring to a test to change a person's employment status in any way.

The Committee also recognizes the need to protect "whistleblowers" from employer retaliation. The bill prohibits employers from discriminating against a person who files a complaint or chooses to testify in a proceeding related to lie detector violations.

Notification Requirements

The Committee understands that employees have an appropriate need to be informed of their rights regarding lie detector tests in the workforce. The bill makes a concerted effort to inform employees by requiring employers to post a notice on the premises in conspicuous and typical places. This notice, which is similar to the notices required by the Fair Labor Standards Act, will be prepared, printed and distributed by the Secretary of Labor, relieving employers from all responsibility, except for posting requirements. The Committee, by accepting the bill language, recognizes the need for the Secretary of Labor to have adequate authority to effectively enforce the Act, including the power to issue rules and regulations, to make appropriate investigations and inspections, and to subpoena appropriate witnesses for any hearing or investigation.

Enforcement Provisions

The Committee recognizes the need for strong enforcement provisions to discourage employers from violating the Act. The Committee sought to achieve that result by providing a 3-year private right of action as well as by injunctive enforcement by the Secretary of Labor to give victims an effective set of remedies.

The committee recognizes the seriousness of violations of this Act by providing for civil penalties of up to \$100 a day for employer failure to post the notice and up to \$10,000 for any other violation. This reported bill also details the administrative procedures for the assessment and collection of these fines for intentional violations as outlined in the Migrant and Seasonal Agricultural Worker Protection Act.

Exemptions

The Committee recognizes that certain federal contractors should be exempted from the provisions of this bill. It is the intent of this

Committee that in matters of national security, private consultants, contractors and employees of contractors will be exempted from this Act when performing counterintelligence or intelligence work with the Central Intelligence Agency, National Security Agency, Federal Bureau of Investigation, and Department of Defense. The Committee also acknowledges that cryptologists working for the CIA or NSA as well as private experts or consultants working with atomic energy defense activities in the Department of Energy are also exempted from this Act. The Committee understands that these exemptions will include private contractors as well as individual consultants.

In providing these exemptions, the Committee intends that lie detectors be used as only one tool in the investigation of an employee. During consideration of this legislation, members of the Committee emphasized that lie detectors shall not be used as the sole determinant of an employer's action against an employee.

The Committee, by accepting the bill, also placed the focus of coverage for the bill's provisions on employers to facilitate enforcement monitoring and also to expand Federal agency exemptions. By defining "employer" to include any person acting directly or indirectly in the interest of an employer in relation to any employee or prospective employee, private sector actions are broadened, and Federal employer exemptions are increased.

LIE DETECTOR DEFINITION

The Committee deleted the inclusion of "written or oral honesty tests" from the definition of lie detector test, which was inserted during subcommittee markup. In doing so, the Committee has returned the definition to its original form to include any examination involving the use of any polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other mechanical or electrical device used for the purpose of detecting honesty or dishonesty.

In deciding to strike the language from the definition, the Committee concludes that this issue should be handled separately from the lie detector.

The Subcommittee on Employment Opportunities heard testimony from the American Psychological Association and the American Medical Association recommending the inclusion of "written and oral honesty tests" which do not meet national standards (as cited below) in the definition of lie detector in section seven of this Act.

The Committee has learned that sections of some written or oral psychological tests are being used to measure an individual's honesty despite the fact that these tests were designed for another purpose.

The Committee recommends that tests used in the workplace by employers and the testing industry meet the "Standards for Educational and Psychological Testing" that are prepared by the American Educational Research Association, the American Psychological Association and the National Council on Measurement in Education.

OVERSIGHT FINDINGS

With reference to clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives, the Committee reports that no findings or recommendations of the Committee on Government Operations were received during the 100th Congress with reference to the subject matter addressed by H.R. 1212. This is new legislation. No oversight findings exist which might be reported to conform with clause 2(1)(3)(A) of rule XI of the Rules of the House of Representatives.

COST ESTIMATE

The Congressional Budget Office (CBO) has provided the Committee on Education and Labor with the following estimate on the costs involved in implementing this legislation. The Committee concurs with and adopts CBO's estimate, pursuant to Clause 2(1)(3)(C) of rule XI of the Rules of the House of Representatives. No other cost estimates have been received from any Federal agencies or departments.

**U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 6, 1987.**

**Hon. AUGUSTUS F. HAWKINS,
Chairman, Committee on Education and Labor,
U.S. House of Representatives, Washington, DC.**

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 1212, the Employee Polygraph Protection Act, as ordered reported by the House Committee on Education and Labor, June 10, 1987.

This bill outlaws the use of polygraph tests on any employee or prospective employee by private employers. The Secretary of Labor is directed to distribute a notice that employers are prohibited from using lie detector tests, to issue rules and regulations, and to enforce the provisions of this act. No significant costs to the federal government, and no cost to state or local governments would be incurred as a result of enactment of this bill.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

JAMES BLUM
(For Edward M. Gramlich Acting Director).

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(1)(4) of rule XI of the Rules of the House of Representatives and after reviewing the Congressional Budget Office cost estimate, the Committee expects this legislation will not have an inflationary impact upon prices and costs in the operation of the national economy.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, the Committee reports that there are no changes to existing Federal law made by this bill as reported.

SECTION-BY-SECTION ANALYSIS OF H.R. 1212***Section 1.—Short Title***

This section cites the Act as the "Employee Polygraph Protection Act."

Section 2.—Prohibitions of Lie Detector Use

Section 2 outlines the lie detector prohibitions for employers engaged in commerce or the production of goods for commerce.

This section makes it illegal for employers, when related to employees or potential employees, to:

1. Require, request, suggest or cause a person to take or submit to any lie detector test;
2. Use, accept, refer to, or inquire concerning the results of any lie detector test;
3. Discharge, dismiss, discipline, or deny employment or promotion to a person, or threaten to, for refusing, declining, or failing to take or submit to any lie detector test or on the results of any lie detector test;
4. Discharge or discriminate (commit reprisal) against a person for filing any complaint, instituting or causing to be instituted or testifying in any proceeding related to this Act.

Section 3.—Notice of Protection

This section requires the Secretary of Labor to prepare, print and distribute a notice to employers that states employers are prohibited by this Act from using a lie detector test any employee or prospective employee.

It also requires the employer to post the notice on all employer premises where notices are usually posted upon receipt.

Section 4.—Authority of the Secretary of Labor

Section 4 authorizes the Secretary of Labor to set up provisions for the implementation of the Act by allowing the Secretary to:

1. Issue needed rules and regulations;
2. Work with regional, State, local or other agencies and furnish assistance to employers, labor organizations, or employment agencies;
3. Investigate, inspect, and require proper recordkeeping.

This Section also gives the Secretary subpoena authority for any hearing or investigation as outlined by the Federal Trade Commission Act (Sections 9 and 10).

Section 5.—Enforcement Provisions

This Section allows injunctive action by the Secretary of Labor or private civil action for employees or potential employees violated by Section 2 of this Act.

The U.S. District Court have jurisdiction to issue temporary or permanent restraining orders and injunctions as defined by the Secretary of Labor. The Secretary is also allowed to assess civil penalties of not more than \$10,000 for violations under this Act except for a civil money penalty of not more than \$100 a day for failure to post the Secretary's notice. The penalty is based on the previous record in terms of compliance with the Act as well as the gravity of the violation. Collection of such penalties is the same as provided for the Migrant and Seasonal Agricultural Workers Protection Act (Subsection (b) through (e) of Section 503.)

Employees or potential employees may also pursue private civil action within 8 years after the date of the alleged violation. Employers in violation of this Act are liable for legal or equitable relief which may include employment, reinstatement, promotion, payment of lost wages, or an additional amount as liquidated damages as well as the costs of such actions including attorney's fees for prevailing plaintiffs. Any one or more employees may bring suit against the employer for the damages in any Federal or State court.

Section 6.—Exemptions

Section 6 exempts all governmental employers, whether Federal, State, local or a political subdivision.

This section also exempts private sector employers doing counter-intelligence or intelligence work with the CIA, DOD, DOE atomic energy defense activities, FBI and NSA.

Section 7.—Definitions

This section provides definitions for the terms used in this Act.

It defines "lie-detector tests" as any examination involving the use of any polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any similar device whether mechanical or electrical.

It defines "employer" as anyone acting directly or indirectly on behalf of an employer including an agent, independent contractor, employee, or any other person.

Reference to Section 3(b) of the Fair Labor Standards Act provides the definition of "Commerce."

Section 8.—Effective Date

Section 8 states the Act takes effect six months after the date of enactment.

MINORITY VIEWS ON H.R. 1212—EMPLOYEE POLYGRAPH PROTECTION ACT

We are strongly opposed to H.R. 1212, the Employee Polygraph Protection Act. It is a hypocritical response to a problem that does not exist.

The premise of this bill is that polygraphs and other lie detectors are highly inaccurate, that they incorrectly identify vast numbers of workers as deceptive, and that these workers are fired or not hired as a result.

This premise is faulty for several reasons. While there is no absolute figure for accuracy, estimates range as high as 95 percent, and even opponents of polygraphs will concede that an 85 percent accuracy estimate is not unreasonable. Employers who use polygraphs also regard them as very accurate. They would not pay for them if they did not.

But even at a high rate of accuracy, using a single polygraph test as the sole means for selecting or retaining employees would constitute questionable business practice. In fact, employers typically do not follow this practice. A polygraph test is not a substitute for an interview, for it cannot give any information as to a prospective employee's interpersonal skills and other attributes. Moreover, employers who testified before the Committee indicated that if a polygraph examination indicated deceptiveness, an employee or prospective employee would be given a second test. Judged against a standard of perfection, polygraphs fall short. But judged against other hiring and personnel practices, such as interviews and background checks, they are on a par if not superior. An employer should be able to rely on every reasonable means possible to verify a person's honesty.

Employee theft accounts for an estimated \$40 billion in losses every year. Who pays for this theft? We all do, consumers, employers and employees. The polygraph cannot end this theft, but it can keep it in check. And while the scientific community may be divided on the accuracy of polygraphs, the business community is not. Polygraphs work.

Polygraph opponents make much of the "fact" that polygraphs are not admissible as evidence. The Committee Report states that:

The courts in this country refuse to admit polygraph results as evidence in trials because of the documented inaccuracies of these devices. It is sadly ironic that criminals are protected from polygraphs while American workers are not.

The problems with this statement are many. First, in several jurisdictions, both state and federal, polygraph evidence is admissible, generally with prior stipulation by both parties. Second, it makes little sense to suggest that job seekers should be treated the

same as criminals, or more accurately, criminal suspects. Should an applicant be afforded a jury of his or her peers? Should background checks be subject to hearsay rules? The answers are obvious. Of course a person facing prison should be treated differently from one seeking employment. And in fact, admitting polygraph evidence by stipulation is quite similar to the mutual, voluntary procedure by which polygraph tests are administered in the private sector. Moreover, if the courts should serve as our guide, should we not take notice of the fact that the courts have permitted the use of polygraphs for employment purposes for decades?

The judicial branch has recognized the validity of polygraphs. So, too, has the executive branch. Polygraphs play a vital role in the intelligence and counterintelligence efforts of the Department of Defense, the National Security Agency, the Central Intelligence Agency, the Federal Bureau of Investigation and other agencies. Fortunately, the federal government's ability to utilize polygraphs is not impaired by this legislation, which would only restrict the private use of polygraphs while permitting their public use to go unchecked.

Oddly enough, the legislative branch, and the House in particular, has also recognized the usefulness of polygraphs. During consideration of the defense authorization bill in both this session of Congress and last, the House overwhelmingly endorsed the use of polygraphs for national security purposes. And even as the House was adopting the predecessor to this legislation last year, its sponsors agreed that polygraphs should be permitted in the private security, utility, pharmaceutical, day care, and nursing home industries.

We hope that the House will once again recognize the usefulness of polygraphs by rejecting this legislation instead of applying it to certain industries. If limited abuses have occurred and good business practice has not been followed, then at most we should address those abuses. But given the weakness of the arguments for this legislation, and given the proven effectiveness of polygraphs when used properly, Congress should not deprive employers, workers and consumers of an important tool for combatting crime.

STEVE BARTLETT.
DICK ARMEY.
HARRIS W. FAWELL.
CASS BALLENGER.

**DISSENTING VIEWS BY MR. GUNDERSON AND MRS. ROUKE-
MA—EDUCATION AND LABOR COMMITTEE REPORT ON
H.R. 1212, THE "EMPLOYEE POLYGRAPH PROTECTION ACT
OF 1987" JULY 8, 1987**

While we strongly oppose the approach taken in H.R. 1212 to completely ban the use of polygraph testing in the private sector work place, we recognize that the polygraph examination, when used as an employment tool, is subject to many inaccuracies and abuses which may adversely and unfairly impact on honest workers. For this reason, during Full Committee consideration of this legislation we supported an alternative to H.R. 1212 which would have allowed for limited use of the polygraph exam as an investigative tool in the private sector work place.

This substitute would prohibit polygraph testing during preemployment screening, and would prohibit random testing of current employees for no identifiable cause. However, the alternative would allow employers to use the polygraph as an investigative tool in the event of employee theft, embezzlement, misappropriation of funds, industrial espionage, or in the event that a crime had occurred which threatened public safety or resulted in substantial property damage. Such polygraphs may only be administered after the appropriate law enforcement agency or the employer's insurer have been notified.

While banning preemployment testing within most industries, our alternative would have extended an exemption from the preemployment testing ban for those industries that received exemptions in last Congress' House-passed employee polygraph protection bill, H.R. 1524. These exemptions extend to the pharmaceutical industry, for those employees with access to stolen controlled substances; private industry contractors with CIA, NSA, or FBI on matters of national security; security services industries; public utilities; and day care centers and nursing care facilities. We feel that these exemptions are justified due to the high level of risk to public safety inherent in these industries. However the ban on random postemployment testing would extend to all industries, across-the-board.

We realize that even under these limited circumstances the accuracy of the polygraph in the work place is still somewhat at question and subject to many outside variables. However, in developing a fair and reasonable alternative approach to H.R. 1212 we took into account existing research and information on the validity of such examinations. According to a study published by the Office of Technology Assessment (OTA) in 1983, meaningful scientific evidence of polygraph validity could be found in the area of investigations of special criminal incidents. OTA therefore concluded that while accuracy still varies widely based on the specific circumstances of each individual exam, polygraph validity increases with

incident-specific testing. OTA found only four studies showing scientific evidence of validity in preemployment or random postemployment screening situations, one of which was conducted by the Department of Defense.

The Department of Defense has actively used the polygraph examination since World War II. Principal application of the polygraph has traditionally been in the criminal and exculpatory arena but personnel screening was begun by the National Security Agency in 1951 and expanded into other components starting in 1982. DOD feels confident in the validity of the polygraph, even under screening situations, but only if the test is administered properly, by a highly trained examiner.

The Department of Defense regulations governing polygraph examinations are extremely rigorous, providing for lengthy and exhaustive tests. It regulates the types of questions allowed to be asked and the conditions under which the exams are to be given. Examinee rights are clearly defined and explained to individuals to be tested.

In order to protect those employees and job applicants who would still be subject to polygraph examinations under our alternative measure, we provided regulations and restrictions in our Substitute that are patterned to the extent possible after those DOD regulations governing polygraph testing within the Defense Department. For instance, we require that all examinations be composed of 3 parts: A pretest phase where examinees are counseled on all questions to be asked and on the polygraph machine itself; an in-test phase where all relevant questions must pertain to the investigation at hand; and a post-test phase where the examiner goes over the results of the test with the examinee. Our alternative also required that no more than 6 examinations may be completed by a polygraph examiner in any one calendar day, and that no test may be conducted for a period of less than 90 minutes. While not as strict as those provided for by DOD, we feel that these regulations go a long way in increasing the validity of the polygraph examination.

In addition we provided that any polygraph testing allowed under this alternative must be consistent with applicable State and local law; consistent with any negotiated collective bargaining agreement that explicitly or implicitly limits or prohibits the use of such lie detector exams; and that in the case of an investigation such tests would only be administered to employees with access to the stolen property or facilities around which the crime occurred and only allowed when such crime has been reported to the appropriate law enforcement agency or employer's insurance company prior to polygraph testing.

While we continue to have concerns over the use of the polygraph in the workplace, even under these restricted circumstances, we feel that this alternative provides us with a much more reasonable approach to this issue.

It provides workers with protections against less accurate screening exams, it provides employers with added protection against employee theft and crime, and it provides us with a position that is not quite so hypocritical in light of the fact that we do nothing to prohibit the use of the polygraph in the public sector—but we con-

tinue to allow the use of the exam throughout the Federal, state and local governments—and for such important uses as for our Nation's defense and national security.

Unfortunately, polygraph testing can and has in the past resulted in unfair employment discrimination against honest job applicants and employees. Even under the best of circumstances there is a margin of error which is cause for great concern to those interested in worker rights. However, do we completely ban the use of such a tool when many experts agree that it can be an accurate and valuable tool in combating employee theft and crime when administered properly?

What we need to carefully determine is what the proper role of the Federal government should be in providing protection against polygraph abuses in the workplace, while still allowing employers to protect themselves from increasing rates of employee theft. This is a particularly poignant question for businesses in "high risk" industries where theft and employee turnover is high, especially at a time when losses in the retailing industry alone equal \$10 billion per year due to employee theft.

The substitute which we supported, but which unfortunately failed in Committee achieves this goal. We hope that we will be successful in achieving its passage in place of H.R. 1212 as reported when this legislation goes to the House floor in the future.

STEVE GUNDERSON.
MARGE ROUKEMA.

ADDITIONAL VIEWS OF MR. GOODLING, MR. BARTLETT, MR. ARMEY, MR. FAWELL, AND MR. BALLENGER ON H.R. 1212, THE "EMPLOYEE POLYGRAPH PROTECTION ACT"

H.R. 1212 would prohibit the use of polygraph testing in the private sector. We oppose passage of this legislation and believe it is both unfair and unworkable. We support H.R. 1536—which would allow continued use of the polygraph under strict guidelines—as a substitute approach.

When the House passed similar legislation in the 94th Congress, a string of amendments was added to exempt industry after industry from the ban on polygraph testing. These exemptions were approved because industry representatives presented solid arguments about their need for polygraph testing to protect their inventories and assets, their customers, and the public health and welfare.

When H.R. 1212 reaches the House floor, we believe we can expect an even longer line of businesses seeking exemptions from the proposed ban. This is unfair to the businesses that are not granted exemption, and it is unfair to the employees of those who are exempt because they may be subjected to unregulated examinations and potential abuse.

We do not question the need for regulation of the polygraph technique. We have heard testimony from witnesses who present convincing evidence of the need for protections against abuse and misuse of the polygraph.

But we believe that an outright ban on polygraph testing is simply too drastic an answer to this problem. It won't work, and it is unfair.

The validity of polygraph testing is hotly debated. National security agencies appeal to us to allow expanded use of polygraph testing to guard classified information, and we grant them these requests. The administrators of these agencies have told us that polygraph examinations can uncover information about the past and present activities of federal and military employees which cannot be obtained in any other way.

They present convincing arguments on behalf of allowing use of polygraph examinations, just as business and industry do. We believe that if the federal government and American business did not find value in polygraph testing, they would consider the resources expended on such examinations to be a waste of time, effort, and funds, and no longer utilize them. However, this is not happening.

At the same time, no clear-cut, indefensible evidence has been presented to prove that the polygraph technique is accurate in every case. We often hear stories about people who have lost jobs and who have had their professional lives damaged by polygraph results which they claim to be wrong.

Because of the divisiveness of this issue, we urge our colleagues to consider an alternative proposal that would allow continued use

of polygraph testing—but only if strict guidelines are followed governing the administration of the test and protecting the rights of examinees. We support this approach, embodied in H.R. 1536, the Polygraph Reform Act of 1987, sponsored by Congressmen Bill Young of Florida and Buddy Darden of Georgia.

H.R. 1536 would establish strict federal guidelines to assure examiners are qualified and that they use accurate equipment. It would protect the rights of examinees by making it illegal for examiners to ask personal questions concerning religion, racial, political or social beliefs, or other irrelevant personal questions. It would protect the confidentiality of examination results.

Additionally, *H.R. 1536 would assure that no employment decisions would be made based solely upon polygraph examination results* or refusal to take a polygraph examination. And, it would treat all industries equally by denying special exemptions.

The Young-Darden proposal respects the rights of examinees as well as the rights of American business and industry to use the polygraph as an investigative tool.

But, more importantly, perhaps, H.R. 1536 respects the rights of States to regulate polygraph use—tailoring it to the needs of their citizens. Two-thirds of the States have passed laws governing administration of the polygraph, ranging from outright bans to regulation.

Not every problem has a federal solution. To enact an outright ban on polygraph use in the private sector when no consensus has been reached on its validity is not only unfair, it is unwise. Such a ban would also clearly establish an unfair double standard by allowing its use in the public sector, and prohibiting it in the private sector.

We urge the support of the Young-Darden legislation as a responsible alternative to H.R. 1212.

BILL GOODLING.
STEVE BARTLETT.
DICK ARMEY.
HARRIS W. FAWELL.
CASS BALLENGER.

SUPPLEMENTAL DISSENTING VIEWS

I support the reasoned approach taken in Mr. Gunderson's substitute to H.R. 1212 and am pleased it includes my amendment exempting the private security industry. However, any legislation restricting the use of polygraph examinations by employers should also include an exemption for the banking and securities industries. Regrettably, the Roukema amendment offered during full Committee consideration of H.R. 1212 to exempt federally-insured banks and financial institutions and those stock exchanges and investment companies regulated pursuant to the Securities Exchange Act was rejected.

By their nature, such financial entities handle enormous amounts of cash and securities each day. Therefore, employees—from the lowest clerk to the highest executive—have daily access to significant funds. Losses from internal fraud and embezzlement are high. In fact, according to the Federal Bureau of Investigation (FBI), over \$1.1 billion was lost by banks, credit unions and savings and loans last year alone. Employees are responsible for greater losses than all robberies, burglaries and larcenies combined. For this reason, the Federal Deposit Insurance Act prohibits federally-insured banks from employing any person convicted of any criminal offense involving dishonesty or breach of trust without first obtaining the written approval of the Federal Deposit Insurance Corporation (FDIC).

For precisely these reasons, the Chairman of the FDIC and the Chairman of the Securities and Exchange Commission (SEC) have urged exemption of financial institutions from the strictures of this legislation.

Last year, the full House approved a Roukema amendment that exempted the private security industry (included this year in the Gunderson substitute). It would be completely anomalous and wholly contradictory to exempt armored car personnel responsible for transportation of cash, etc. and then not exempt the employees of the banks and other financial institutions who handle that cash every day.

While there exist certain questions about the reliability of polygraphs as an absolute indicator of honesty, there is no question about the utility of using this device as one part of an integrated system to evaluate employee trustworthiness. We should not deny those employers whose businesses, by their nature, have a basic foundation in honest this important tool.

Finally, let me emphasize that the House came close to passing this exemption for financial institutions. The primary reason for the failure of this provision was its breadth—it included pawnbrokers, telegraph companies and travel agencies.

23

My amendment has been carefully written to include only those institutions insured by the federal government or regulated by the Securities and Exchange Commission. I intend to offer this Roukema amendment during floor consideration of H.R. 1212.

MARGE ROUKEMA.

ADDITIONAL DISSENTING VIEWS OF MR. GRANDY ON H.R. 1212

Although I cannot support H.R. 1212 which would completely ban the use of the polygraph test in the private sector workplace, I believe the time has come to protect the American worker from the types of abuses propagated by the misuse of the polygraph. At the same time, however, employers have a legitimate right to protect their businesses from crimes committed by employees. H.R. 1212 does not adequately protect both the employee and employer. For this reason, I am proposing a reasonable alternative which does justice to all concerned.

To balance the rights of both employer and employee, we need to allow use of the polygraph in those instances where it is most effective, namely, after a specific crime has been committed. Obviously, the test must be conducted within appropriate boundaries which protects basic civil rights of the employee. I am supportive of regulations similar to those proposed in H.R. 1536 and by the substitute offered in Committee mark-up by Mr. Gunderson. However, both of these proposals would allow the polygraph to be used in pre-employment instances and therefore, do not adequately address the fundamental issue of worker protection.

H.R. 1212, on the other hand, offers no protection to employers against employee crime. Research indicates that the polygraph is most accurate when used after a specific crime has been committed. Under these circumstances, the polygraph should be allowed as only one tool among many to assist employers in protecting their inventories from employee theft. A complete ban on the polygraph does not recognize the legitimate interests of employers, and should therefore be rejected.

We can best balance the interests of both employees and employers by restricting its use to those circumstances wherein the polygraph is most effective and at the same time regulating the test so as to honor the civil rights of those being tested. I will continue to pursue this balanced approach as this bill is debated on the House floor.

FRED GRANDY.

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